

**United States
Court of Appeals
for the Ninth Circuit**

KAL W. LINES, Trustee in the Estate of AL-
BERT C. SCHOENING,

Appellant,

vs.

NORMA SCHOENING,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED
JUN 6 1961

No. 17309

United States
Court of Appeals
for the **Ninth Circuit**

—
KAL W. LINES, Trustee in the Estate of AL-
BERT C. SCHOENING,

Appellant,

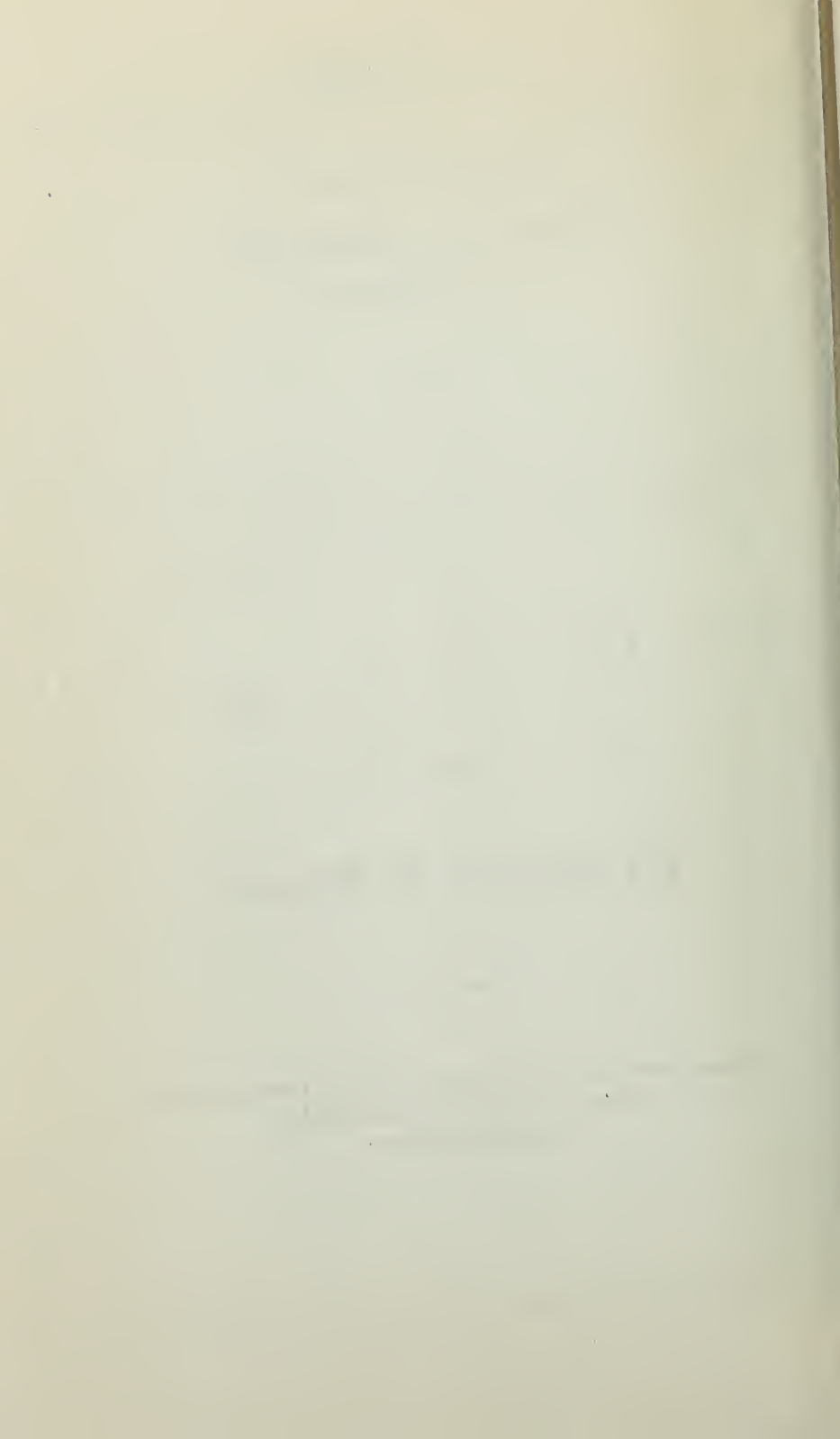
vs.

NORMA SCHOENING,

Appellee.

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Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

LOYD W. CARTER

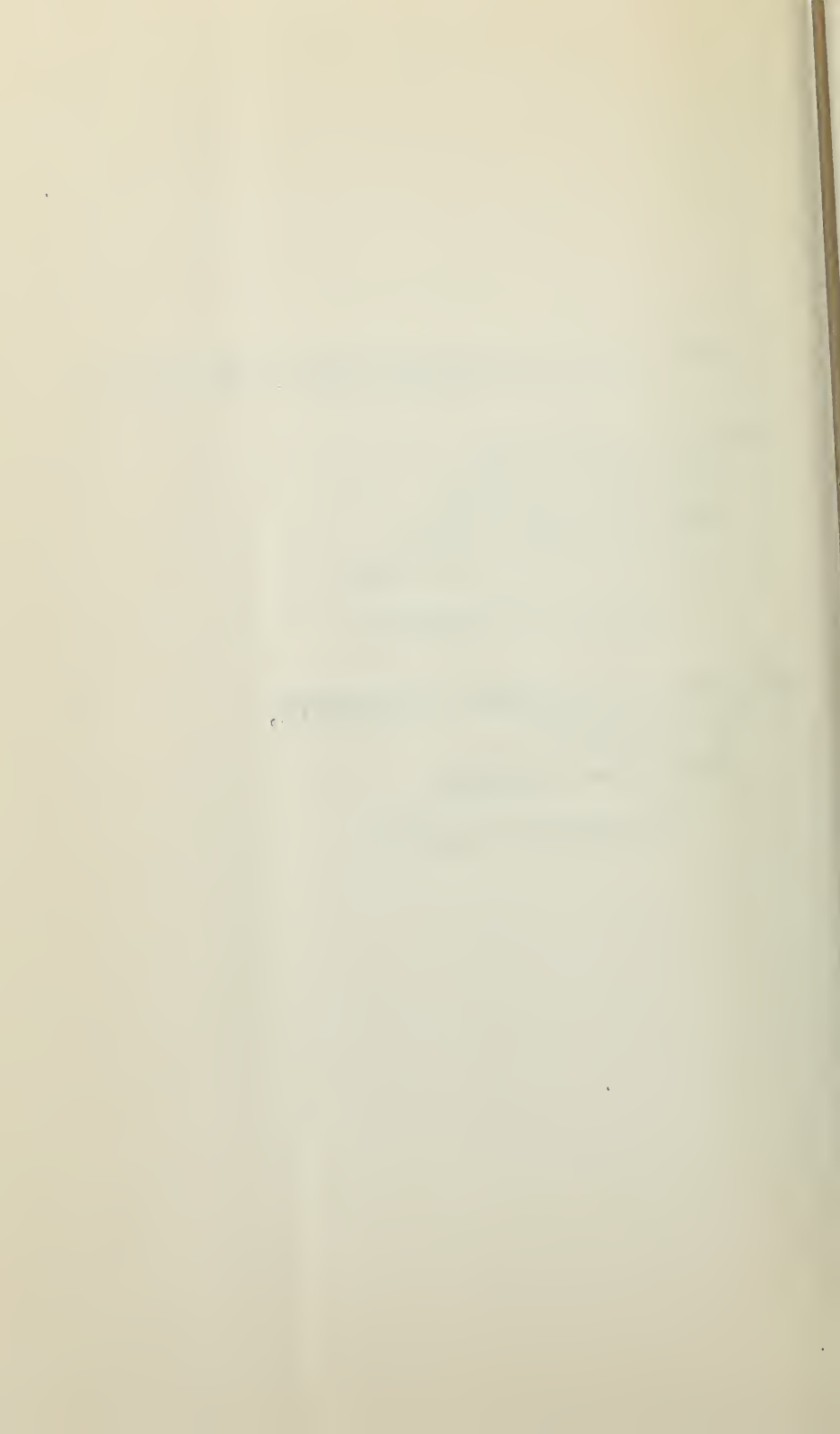
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Attorneys for Appellee.



In the Southern Division of the United States
District Court for the Northern District of
California

No. 47987—In Bankruptcy

In the Matter of

ALBERT C. SCHOENING,

Bankrupt.

CERTIFICATE AND REPORT OF REFEREE
RELATIVE TO PETITION FOR REVIEW
OF ORDER DATED AUGUST 4, 1960

To Honorable Louis E. Goodman, United States
District Judge for the Northern District of
California:

I, Lynn J. Gillard, one of the referees in bankruptcy of the above-entitled court and the referee primarily in charge of the above-entitled bankruptcy proceeding, hereby respectfully certify and report:

This matter now is before the above-entitled United States District Court, acting in this specific proceeding in the above-entitled bankruptcy proceeding as an appellate court*, under the following set

*“In passing upon a petition for review of a referee’s order, ‘the proceeding is in substance an appeal from the court of bankruptcy * * * i.e., the referee * * * to the District Court.’ In re Pearlman (C.C.A.) 16 F. (2d) 20, 21.”

In re Big Blue Min. Co., (D.C., N.D., Calif.) 16 F. Supp. 50, 51 (Opinion by St. Sure, District Judge).

of circumstances leading up to the asking for a review of the complained-of order.

Papers Handed Up Herewith

Handed up herewith, as parts of this Certificate and Report, are the following purposes:

1. Petition for Turnover Order;
2. Order to Show Cause;
3. Answer of Norma Schoening to Petition for Turnover Order;
4. Trustee's Memorandum of Points and Authorities;
5. Respondent's Reply Memorandum;
6. Order (vacating submission for decision and resetting matter for hearing);
7. Reporter's Transcript (July 7, 1960), Book I and Book II;
8. Findings of Fact, Conclusions of Law and Order;
9. Petition for Review.

Dated: September 8, 1960.

Respectfully submitted,

/s/ LYNN J. GILLARD,

Referee in Bankruptcy.

[Title of District Court and Cause.]

PETITION FOR TURNOVER ORDER

To The Honorable Burton J. Wyman, Referee
In Bankruptcy:

The petition of Kal W. Lines, Trustee of the estate of the above-named bankrupt respectfully represents:

That your petitioner is the duly appointed, qualified and acting Trustee of the estate of the above-named bankrupt who filed his petition in bankruptcy herein, and was thereafter duly adjudged a bankrupt;

That on the date of filing his petition in bankruptcy said bankrupt had in his possession one (1) 1952 Nash 4-door Statesman automobile; that pursuant to Section 690.24 of the Code of Civil Procedure of the State of California, said automobile was not exempt to said bankrupt; that on February 19, 1957, your petitioner filed his Trustee's Report of Exempt Property in which refused to exempt said automobile;

That on April 8, 1957, Trustee's Sale (Sealed Bids) of said 1952 Nash 4-door Statesman automobile was conducted before Honorable Burton J. Wyman, Referee in Bankruptcy; that said automobile was sold to one George Field, sale to said George Field being confirmed by said Referee in Bankruptcy;

That your petitioner has demanded of said Albert C. Schoening, bankrupt herein, that he turnover to your petitioner the ownership certificate for said 1952 Nash 4-door Statesman automobile, but that said Albert C. Schoening has failed and refused to turnover the same.

That on the date that he filed his petition in bankruptcy, said bankrupt had not filed his federal income tax return for the year 1956; that right to any refund of income tax for the year 1956 for which said bankrupt could make claim against the Director of Internal Revenue, passed to your petitioner upon the filing of the petition in bankruptcy herein;

That your petitioner has demanded of said bankrupt that he turnover to your petitioner a copy of the federal income tax return for the year 1956 filed with the Director of Internal Revenue by Albert C. Schoening, bankrupt herein, and has demanded that said bankrupt turnover to your petitioner any refund of income tax received by said bankrupt by reason of over-payment of his income tax for the year 1956, but that said bankrupt has failed and refused to turnover the same.

Wherefore, your petitioner prays for an order directing Albert C. Schoening, bankrupt herein, to turnover to Kal W. Lines, Trustee, the ownership certificate for 1952 Nash 4-door Statesman automobile, a copy of the federal income tax return for the year 1956 filed by said Albert C. Schoening, and any refund of income tax received by said Albert

C. Schoening by virtue of said federal income tax return for the year 1956; for costs incurred herein and for such other relief as may be just and proper in the premises.

/s/ KAL W. LINES,
Trustee.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

I, Kal W. Lines, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ KAL W. LINES.

Subscribed and Sworn to before me this 8th day of August, 1957.

[Seal] /s/ EDNA H. SMITH,
Notary Public, in and for the City and County of
San Francisco, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed August 8, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the consideration of the verified petition of Kal W. Lines, for order directing Albert C. Schoen-

ing, bankrupt herein, to turnover to said Trustee the federal income tax return for the year 1956 filed by said Albert C. Schoening, and any refund of income tax received by said Albert C. Schoening, also the ownership certificate for 1952 Nash 4-door Statesman automobile, and good cause appearing therefor,

It Is Hereby Ordered that Albert C. Schoening, bankrupt herein, personally be and appear before the undersigned Referee in Bankruptcy, at his court room, Room 609, Grant Building, 1095 Market Street, San Francisco, California, in said district, at the hour of 2:00 o'clock p.m., on the 22nd day of August, 1957, then and there to show cause, if any he has, why the prayer of said petition should not be granted; and

It Is Further Ordered that service of this order may be made upon said Albert C. Schoening by mailing a true copy of this order, together with a true copy of said petition to said Albert C. Schoening at 2034 - 23rd Avenue, San Francisco, California, in said district, at any time not less than three (3) days prior to the aforesaid return date thereof.

Dated: San Francisco, in said district; August 8, 1957.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed August 8, 1957.

[Title of District Court and Cause.]

ANSWER OF NORMA SCHOENING TO
PETITION FOR TURNOVER ORDER

Comes Now Norma Schoening and voluntarily appearing in response to the Petition for Turnover Order heretofore filed herein on the 8th day of August, 1957, by Kal W. Lines, Trustee, of the Estate of the above-named bankrupt and answers said petition as follows:

1. This respondent alleges that by virtue of claim for refund thereof endorsed upon the joint United States individual income tax return filed by this respondent and the above-named bankrupt, her husband, for the calendar year 1956 there became due by the United States and that there was transmitted by the Director of Internal Revenue for the First California District refund Treasury check payable to the joint order of the above-named bankrupt and this respondent in the sum of \$968.92, which is in the possession of this respondent and said bankrupt.

2. That, as more particularly appears from the said 1956 individual income tax return, said refund, to the extent of \$613.92 represents deductions made by F. W. Woolworth Company, by whom this respondent was employed during the said year 1956, from her earnings, and that said sum was at all times and still is a part of the earnings of this respondent for her personal services rendered as an employee of said F. W. Woolworth Company during the said year 1956.

time the parties appeared once again, personally and/or by their respective attorneys of record, and the court being fully advised, now makes the following findings of fact and conclusions of law:

Findings of Fact

1. That at all times relevant to this case, Albert C. Schoening and Norma Schoening were husband and wife.

2. That during the year 1956, the said Norma Schoening was employed by F. W. Woolworth Company; that she received from said company total wages of \$3,410.76 for said year; that said company withheld for taxes from the wages of said Norma Schoening the sum of \$619.92;

3. That the said Albert C. Schoening and Norma Schoening filed a joint Federal Income Tax Return for the year 1956, which return has been received in evidence;

4. That during the said year of 1956, the combined earnings of the said Albert C. Schoening and Norma Schoening were \$3,875.36;

5. That during the same year, the said persons incurred losses totalling \$5,133.38, and that the combined net loss of the two said individuals for the said year was therefore \$1,258.02; that said net loss resulted from the business operations of Albert C. Schoening, the bankrupt herein;

6. That subsequent to the filing of the said joint tax return, the United States Government refunded to the said Albert C. Schoening and Norma Schoening the sum of \$968.92; that the said refund was on account of overpayment of the liability owed by the said two individuals; that the said sum of \$613.92 withheld from wages of Norma Schoening was included in the said refund; that said sum of \$968.92 was refunded as a result of the business loss of Albert C. Schoening, bankrupt herein, and which business loss was included in said claim for refund;

7. That the withholding of the said \$613.92 from wages of said Norma Schoening and the payment of the said sum to the United States Government by her employer was for and on account of the combined tax liability of the said Norma Schoening and Albert C. Schoening; that following the withholding of the said sum, Norma Schoening exercised no control whatsoever over the said funds; that the said funds were commingled with funds withheld from other wage earning taxpayers and particularly with the sum of \$355, which latter sum was composed of \$55 withheld from wages of Albert C. Schoening and \$300 paid by the Albert C. Schoening as part of his estimated tax for the year 1956;

8. That the refund by the United States Government of the sum of \$968.92 was made to the said Albert C. Schoening and Norma Schoening because they filed a joint income tax return for the said year 1956;

From the foregoing facts, the court makes the following conclusions of law:

Conclusions of Law

1. That the wages earned by Norma Schoening, wife of the bankrupt herein, during the year 1956, were, at all times relevant herein, community property of said Norma Schoening and Albert C. Schoening, bankrupt herein.

2. That at the various times when the sums totalling \$613.92 were withheld from the wages of Norma Schoening and thereafter turned over by her employer to the United States Government said funds, so withheld, lost their identity as earnings and/or wages of the wife (Norma Schoening) and that said Norma Schoening thereupon lost all control over said funds so withheld from her wages.

3. That the said sum of \$613.92, which was withheld from the wages of Norma Schoening, wife of the above-named bankrupt, was, when paid to the United States Government by her employer, commingled with the funds of other taxpayers and particularly with funds of the said Albert C. Schoening, bankrupt herein.

4. That when the sum of \$968.92 was refunded to Albert C. Schoening and Norma Schoening, by the United States Government, as a tax refund, the sum of \$613.92 included therein was not a refund of wages to Norma Schoening, but was, on the contrary, a refund of the overpayment of tax paid by

Albert C. Schoening and Norma Schoening jointly, and that said refund was made to said persons jointly, as community property, and as a result of the tax loss claimed by said persons jointly, for the year 1956.

5. That the trustee in bankruptcy in the above-entitled matter, Kal W. Lines, is entitled to said tax refund, made payable to Albert C. Schoening and Norma Schoening, in the amount of \$968.92 and is entitled to an order directing said bankrupt and his wife, Norma Schoening, to turn over said sum to said trustee.

Whereby It Is Ordered, Adjudged and Decreed that Albert C. Schoening and Norma Schoening, and their agents, employees and attorneys, be, and they hereby are, ordered to turn over to Kal W. Lines, Trustee herein, said income tax refund in the amount of \$968.92 and/or turn over to said trustee a sum in cash equivalent thereto, said sum to be turned over to said trustee within ten (10) days from the date of this order.

Dated: August 4, 1960.

/s/ LYNN J. GILLARD,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

Lodged July 28, 1960.

[Endorsed]: Filed August 4, 1960.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Comes now Norma Schoening, wife of the above-named Bankrupt, and respectfully represent:

I.

That your Petitioner is a party aggrieved by the Findings of Fact, Conclusions of Law, and Order heretofore made and entered herein by Honorable Lynn J. Gillard, Referee in Bankruptcy of the above-entitled Court, on the 4th day of August, 1960, a full, true and correct copy of which said Order is hereto annexed, marked Exhibit "A," and hereby expressly referred to and made part hereof.

II.

That the aforesaid Order, wherein and whereby Petitioner was required to pay over to Kal W. Lines the sum of \$613.92 from the income tax refund received by your Petitioner and the Bankrupt above named as in said Order described, was and is erroneous in each and all of the following particulars, viz.:

(a) That the Findings of Fact made by said Referee in and to support his said Order of August 4, 1960, numbers 6 and 7, are not supported by, and are contrary to, the evidence adduced by the respective parties upon said Trustee's Petition for Turnover Order and your Petitioner's Answer thereto.

(b) That the Conclusions of Law drawn from said Findings of Fact by said Referee in and to support his said Order of August 4, 1960, numbers 2, 3, 4 and 5, are not supported by the said Findings of Fact nor any thereof, nor by the evidence so adduced as aforesaid, before said Referee.

(c) That, contrary to the said Findings and Conclusions of said Referee as set forth in said Referee's Order of August 4, 1960, the sum of \$613.92, which was withheld from the wages of your Petitioner and thereafter turned over by her employer to the United States government, did not and could not lose its identity as portions of her said earnings, nor did your Petitioner lose all or any control thereover by reason of the filing of the joint tax return with her husband, the Bankrupt above named; and that, at all of the times herein and in said Referee's Order mentioned, said sum of \$613.92 was and is a part of the earnings of your Petitioner for her personal services rendered for her employers during the year 1956 and neither were nor are subject to any of the debts of the above-named Bankrupt, in that as more particularly appears from all of the evidence adduced before said Referee in Bankruptcy, none of said Bankrupt's indebtedness at the time of the commencement of the above-entitled proceedings was incurred for necessities of life furnished by his creditors either to your Petitioner or to said Bankrupt, her husband.

Wherefore your Petitioner prays that the afore-

said Order herein made by the said Referee in Bankruptcy on the said 4th day of August, 1960, insofar as it requires your Petitioner to turn over to said Trustee the sum of \$613.92, be reviewed by a Judge of the above-entitled Court in accordance with the provisions of Section 39-c of the Bankruptcy Act, and that said Order be, by said Judge, reversed, with instructions to said Referee in Bankruptcy to make and enter herein an order denying said Trustee's Petition for Turnover Order insofar as said sum of \$613.92 is concerned; or for such other and further order as may be just and proper in the premises.

NORMA SCHOENING,

By /s/ ARTHUR P. SHAPRO,

One of Her Attorneys.

Affidavit of Service by Mail attached.

Duly verified.

[Endorsed]: Filed August 15, 1960.

[Title of District Court and Cause.]

HEARING ON PETITION FOR
TURNOVER ORDER

Thursday, July 7, 1960—10:00 A.M.

Appearances:

For the Trustee:

KAL W. LINES,

Trustee.

For the Respondent, Norma Schoening:

SHAPRO & ROTHSCHILD, by

ARTHUR P. SHAPRO, ESQ.

The Referee: The matter of Albert C. Schoening.

Mr. Shapro: Ready for the respondent, Mrs. Schoening.

Mr. Lines: The Trustee is appearing on his own behalf on that, your Honor. Mr. Carter wasn't available this morning, and so far as the Trustee is concerned, we will submit the matter as it now stands directly before the Court. I think there is nothing to be added. Factually, I think there is no question of credibility.

There is nothing but the question of law involved. There was no testimony taken. We stipulated as to the facts and I will respect the views as to the law under the facts that have already been submitted in the form of short briefs, and the respondent has no objection. In fact, the respondent would invite and consent to the matter being re-submitted to your Honor upon the record.

The Referee: There was a petition by the Trustee for a turnover order with reference to both the tax and a Nash Sedan.

Mr. Lines: The Nash Sedan was turned over——

Mr. Shapro: ——was turned over. That was not an issue.

The Referee: The petition was directed to Albert C. Schoening to turn over any refund of income tax received by Schoening. In response thereto,

there was an answer filed by Norma Schoening, and she voluntarily appeared and alleged that there was a joint check from the Director of Internal Revenue—a check payable jointly to Norma Schoening and Albert C. Schoening in the amount of \$613.92—which check is in the possession of both of them; and that the refund to the extent of \$613.92 represents deductions made from her salary while employed by the F. W. Woolworth Company.

There is no contest as to the accuracy of that fact?

Mr. Lines: None whatsoever.

Mr. Shapro: None whatsoever.

The Referee: That the \$613 is in essence her wages and therefore should be turned over to her. The matter was apparently argued in brief, the Trustee's memorandum setting forth what the facts were as stipulated by the parties. Is there any disagreement as to what the facts are as covered by that stipulation?

Mr. Shapro: No, your Honor. Our reply memorandum indicates that we are in accord with the facts as stated.

The Referee: There was no stipulation with reference as to whether or not there are any community debts of the parties. I do not see any community debts listed on the schedules, but I think that I should have your stipulations as to whether or not there are any community debts with reference to the necessities of life.

Mr. Lines: The Trustee on that would stipulate that there are no community debts—or phrasing it

differently, no debts for the necessities of life—scheduled on the Schedules of the Bankrupt; nor has there been any evidence that there are such debts.

Mr. Shapro: We will accept that stipulation in joint interest, your Honor.

* * *

(Proceedings concluded in Book II.)

[Endorsed]: Filed August 29, 1960.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 47987 in Bankruptcy

In the Matter of:

ALBERT C. SCHOENING,

Bankrupt.

Before: Honorable Lynn J. Gillard,
Referee in Bankruptcy.

Thursday, July 7, 1960—10:00 A.M.

HEARING ON PETITION FOR
TURNOVER ORDER

Reporter's Partial Transcript

Appearances:

For the Trustee:

KAL W. LINES,

Trustee.

For the Respondent, Norma Schoening:
SHAPRO & ROTHSCHILD, by
ARTHUR P. SHAPRO.

The Referee: Well, then, I have Respondent's Reply Memorandum on this. If you are willing to submit the matter on that record, I think I am ready to dispose of this thing, although it is not easy, but decision is better than indecision.

I don't think that Section 168 was designed to reach this kind of a situation and I do not find any case in which property which has been divested from the control of the wife can contain the protection as earnings which is afforded by Section 168.

In this case, by operation of law, the wife has to pay withholdings on her wages. Actually, she is not liable in her individual capacity for the tax on all of her earnings. Her earnings are community property and the husband is liable for tax on one-half thereof; and if the parties were to file separate returns, the husband would have to report and pay tax on one-half of her earnings. With a joint return, they become jointly and severally liable for the entire amount of tax that is due on their return.

After the money had been paid to the District Director and if there is a refund, the wife could not get back—even if the refund is in excess of the amount withheld from her wages—the wife could not get back the amount of \$613 from the District Director. The refund would only be made payable

in the manner it has here, to wit: A check for the total amount payable jointly to them. In my view, that refund is community property, which under Section 172, I believe, is subject to the demand and the control of the husband. I don't think that it is wages of the wife subject to her control under Section 168.

Now, the only case that I have found in which the Supreme Court has allowed a tracing—or the Courts have allowed a tracing of the funds of the wife, is in *Street vs. Bertolone*. In every other case they talk about the idea that if there is a traceability, there is a possibility that the wife's earnings will retain the 168 character, but that is indicative of those cases.

In the *Street vs. Bertolone*, it went up not on a fact issue but a pleading issue, wherein the complaint alleged that the wife had in her possession property which was purchased with her earnings, which is a complete segregation situation and not a divestment of control by the wife. The complaint there alleged that she had property which she purchased with her earnings, so that this is the strongest possible case. Now, the Court specifically said in that case that the contention of the creditor that under that Section—even though the earnings of the wife are incorporated with other community property—they will forever remain exempt from the community creditors, was without foundation.

So, there is no case law to support the position which the wife has tried to maintain here. In my view, 168 has no application after the earnings have

been converted in such a fashion that they are no longer within the wife's control, are mingled with community funds and thereafter returned to the parties—in this case as community property.

I suppose we should have this set up in the form which will preserve the record in case you want an appeal. The Trustee should submit findings and conclusions. I think we should probably follow the procedure set forth in the rules of Court. Those findings should be submitted within five days and if there is an objection thereto, counter findings should be submitted by the attorney for Mrs. Schoening within five days—findings and conclusions to be consistent with the data expressed here. If you want to take this up, I will give you the broadest possible ground.

Mr. Shapro: Frankly, your Honor, not only in this case now, but in another one, I think that this matter will be reviewed, so that the record should be as broad as possible under the circumstances.

The Referee: I have made my findings on that record and I will make it the dual finding: (1) That Section 168 has no application where the wife has allowed the funds—her earnings—to be removed from her exclusive control or possession—

Mr. Shapro: On the basis of the payment—

The Referee: —and converted to some other form of property; and (2) that the refund check submitted by the Internal Revenue Service is not a refund of wages.

Mr. Shapro: There are two separate points involved.

The Referee: Correct. A refund of wages and a refund of community property.

[Endorsed]: Filed July 14, 1960.

In the United States District Court for the Northern District of California, Southern Division

No. 47987 in Bankruptcy

In the Matter of:

ALBERT C. SCHOENING,

Bankrupt.

ORDER REVERSING REFEREE'S DECISION
REQUIRING TURNOVER OF FEDERAL
INCOME TAXES REFUNDED TO BANK-
RUPT'S WIFE

On August 8, 1957, Kal W. Lines, the trustee in bankruptcy for bankrupt Albert Schoening, petitioned the Referee in Bankruptcy for a turnover order of, among other assets, “* * * any refund of income tax received by said bankrupt by reason of over-payment of his income tax for the year 1956 * * * (or) * * * any refund of income tax received by said (bankrupt) by virtue of said federal income tax return for the year 1956; * * *”

On August 8, 1957, an order to show cause was issued and the matter came on for hearing before Lynn J. Gillard, Referee in Bankruptcy, on July 7, 1960.

The sum in issue is \$613.92 which was refunded by the Internal Revenue Service in a check made payable to both the bankrupt and his wife, petitioner herein, by reason of the filing of a joint return.

It is agreed between the parties that Norma Schoening, petitioner herein, is, and was during the period in question, the wife of the bankrupt, and that the petitioner and the bankrupt were living together as husband and wife during 1956. Petitioner was an employee of Woolworth Company and during the year 1956 had certain sums withheld from her wages by her employer pursuant to Section 3402 of the Internal Revenue Code of 1954. Petitioner filed a joint return with her husband for the year 1956, and in 1957 received a check, made payable to Albert Schoening and Norma Schoening, from the Internal Revenue Service, in the amount of \$968.92, of which the sum of \$613.92 represented sums withheld from her wages at Woolworth's. The remainder, \$355.80, is not in issue. It represented tax refunds of the bankrupt for estimated tax paid and earnings withheld.

The order appealed from declares that the sum of \$613.92 is community property subject to the debts of the bankrupt, and directs that it be turned over to the trustee.

It is the petitioner's contention that while such sum is community property, it is not subject to the husband's debts, other than those incurred for

necessaries, because the earnings of the wife are exempt under Cal. Civ. Code Section 168. The section is as follows:

“The earnings of the wife are not liable for the debts of the husband; but, except as otherwise provided by law, such earnings shall be liable for the payment of debts, heretofore or hereafter contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together.

Cal. Civ. Code § 168 (1937).

It is stipulated that there is no claim that the debts of the husband are for necessities. (Transcript of hearing, page 3, lines 23-26, page 4, line 1.)

The issues presented to this court are whether sums withheld by an employer and transmitted to the Federal Government are exempt earnings, and, if so, whether they retain their exempt status in the circumstances of this case.

The sums withheld by petitioner's employer, the Woolworth Company, represented “wages” of the employee and are earned income used to prepay or deposit on account with the United States amounts of potential future tax liability. It is clear that the amounts withheld have the character of earnings, in that they constitute part of the payment for the employee's services. The amount that the employee has received “in hand,” plus the amount withheld, equal the employee's full wage.

United States Fidelity & Guaranty Co. v. United States, 201 F. 2d 118 (1952).

It is the contention of the trustee that although the sums withheld are, in fact, wages, when withheld, they lose such character when transmitted to the Collector of Internal Revenue, as they are then being used by the employee for the payment of a debt due another (the Government).

While the language of the Internal Revenue Code speaks in terms of "payment" and "refund of overpayment," thus perhaps supporting such a theory in a tax setting, the characterization of property under the law of federal taxation can not change the law of California, nor does a characterization of property by the federal tax authorities control the determination of the property's status in regard to the community property law. *Grolemond v. Cafferata*, 17 C. 2d 679, 689 (1941).

It being established that the sums withheld represent earnings of the wife when withheld, the questions remaining are three:

(1) Is the exempt status of the funds lost by a comingling with funds of other taxpayers and the bankrupt's?; or

(2) In comingling, has the petitioner waived the exempt status of the funds?; or

(3) Has a waiver of such exempt status occurred by virtue of the filing of a joint return by the petitioner and bankrupt?

It is the trustee's contention that if the sums are still the wife's earnings as defined by Section 168 of the Civil Code after being withheld and transmitted to the Collector of Internal Revenue, they lose their exempt status by being comingled with the husband's (and other taxpayer's) funds in the withholding pool.

It is not necessary to hold the earnings separate and apart from any other funds in order for them to retain their character. It is suggested by the Referee that such a rule is stated by *Street v. Bertolone*, 193 Cal. 755 (1924). The case, however, does not hold that the earnings of the wife must be held separate and apart in order to retain their exempt status in all circumstances.

Where community funds are mingled with other funds, the respective funds remain unchanged in character so long as they can be clearly ascertained. *Faust v. Faust*, 91 C.A. 2d 304 (1949); *Estate of McGee*, 168 C.A. 2d 670 (1959). This is settled in application under California law. Therefore, in ascertaining the character of funds, as here, the controlling principle is not whether the funds have been comingled, but rather whether, if comingled, they are incapable of now being ascertained in their respective original character. In the instant case, the ascertainment of identity is even less difficult than where the funds have been invested into other property or goods. The sums withheld were identifiable as to amount. When placed with other,

monies by the Collector of Internal Revenue they were, as to amount, always readily identifiable. When returned by refund check they were still, as to amount, clearly identifiable. It therefore follows that, while the funds were placed with other funds—those of other taxpayers and those of her husband's—the character of earnings, exempt under Section 168 of the Civil Code, was still attributable to the amount originally contributed by the wife.

The trustee's next contention is that a waiver of the exempt status has occurred by reason of the transmittal of the funds of the Collector of Internal Revenue and the subsequent comingling. This suggests to the trustee that by using “* * * a portion of his (the employee's) earnings for the payment of a debt due another,” and by parting with the portion, “* * * such money * * * loses all its previous characteristics and identity as earnings.” (Points and Authorities, page 6.) This point appears to be based on an incorrect concept of waiver. In order for there to be a waiver there must be the voluntary relinquishment of a known right, *Johnson v. Zerbst*, 304 U.S. 458 (1937). They are required by the Internal Revenue Code and no control over the matter is given, nor can any be obtained, by the employee. (Sec. 3402, I.R.C. 1954.) Therefore, these acts alone could not be said to constitute waiver.

Examining the conduct subsequent to the transmittal of funds to the Collector, it becomes clear

that no waiver has occurred. The trustee contends that conduct can infer a waiver and relies upon *Truelsen v. Nelson*, 42 C.A. 2d 750 (1941).

The *Truelsen* case holds that the character of the earnings can be lost where they are “* * * so mingled with (other property) as to lose their identity.” But this case, and others dealing with the same problem, does not hold that where the identity is ascertainable, as here, that mere comingling is sufficient to bring the *Truelsen* rule into play. The cases require that to have a waiver there must be a mingling sufficient to obliterate the separate character identity within the mass. “The exemption of the wife’s earnings under section 168 of the Civil Code may be waived and is waived where such earnings are so mingled with community property as to lose their identity.” *Tedder v. Johnson*, 105 C.A. 2d 724 (1951) (emphasis added); *Pfunder v. Goodwin*, 83 C.A. 551 (1927); *Tinsley v. Bauer*, 125 C.A. 2d 724 (1954). Therefore, even if it were to be assumed that the withheld sums were voluntarily comingled, there would still be lacking the elements of waiver under the *Truelsen* rule.

There would not be here, as there was in *Truelsen*, conduct inferring relinquishment of the right to keep such earnings exempt under Civil Code Sec. 168. The court in *Truelsen* found that by mingling funds without reference to source and withdrawing funds without reference to which funds were being withdrawn that the parties had acted in a way contrary to a desire to obtain the

benefits of the rights conferred by Sec. 168, and, therefore, indicated, by conduct, a desire to relinquish the right.

As to the third question—has the petitioner, by virtue of filing a joint return with her husband, waived the status of the funds?—we find that the filing of the joint return does not change the ownership or character of any property or funds between the husband and wife. The mere filing of the joint return does not operate as conduct from which a waiver can be inferred under the comingling cases discussed supra, and therefore it does not vest in the community any part of the subsequent tax refund attributable to the wife's earnings as property subject to the husband's debts for other than necessities. In *Matter of Illingworth*, Case No. B37952, District Court of Oregon, July 17, 1956; Snedecor, *Comment on Income Tax Refunds*, 30 *Journal of National Association of Referees* 135 (1956).

The fact that the check is made payable by the Government to both petitioner and her husband does not change the result. *Illingworth*, supra.

It Is Therefore Ordered that the Referee's order made on the 4th day of August, 1960, insofar as it requires petitioner to turn over to said Trustee the sum of \$613.92 be reversed, and that the Referee make his order herein denying Trustee's Petition for Turnover Order insofar as said sum of \$613.92 is concerned.

Dated: December 28, 1960.

/s/ ALBERT C. WOLLENBERG,
United States District Judge.

[Endorsed]: Filed December 28, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Shapro, Anixter & Aronson, Attorneys at Law,
1450 Chapin Avenue, Burlingame, California.

Notice Is Hereby Given that Kal W. Lines, trustee of the estate of the above-named bankrupt, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order, dated December 28th, 1960, of Honorable Albert C. Wollenberg, reversing Referee's decision requiring the turnover of federal income taxes refunded to bankrupt's wife.

Dated: January 24th, 1961.

/s/ BOYD W. CARTER,
Attorney for Trustee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 25, 1961.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein as designated by the Attorneys for the Appellant:

Certificate and report of the Referee relative to petition for Review of Order dated August 4th, 1960, including all documents and transcripts handed up therewith.

Order of the Honorable Albert C. Wollenberg, dated December 24, 1960, reversing Referee's decision.

Notice of Appeal, filed January 25, 1961.

In Witness Whereof, I Have Hereunto Affixed the Seal of the Above-Entitled Court This 6th Day of March, 1961.

[Seal]

JAMES P. WELSH,

Clerk,

By /s/ GROVER M. KELLEY,

Deputy Clerk.

[Endorsed]: No. 17309. United States Court of Appeals for the Ninth Circuit. Kal W. Lines, Trustee in the Estate of Albert C. Schoening, Appellant, vs. Norma Schoening, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 4, 1961.

Docketed March 20, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

U. S. Court of Appeals
for the Ninth Circuit

No. 17309

KAL W. LINES, Trustee of the Estate of AL-
BERT C. SCHOENING,

Appellant,

vs.

NORMA SCHOENING,

Appellee.

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED ON APPEAL AND DES-
IGNATION OF POINTSTo Frank H. Schmid, Clerk of the Above-Entitled
Court:

Comes now Kal W. Lines, trustee of the estate of Albert C. Schoening, Bankrupt, and designates the following as the record to be printed herein:

1. The clerk's transcript in its entirety, as transmitted to you, including Referee's certificate on review, all documents and transcripts submitted therewith, the order herein appealed from and Notice of Appeal.

Appellant further designates the following of his points on appeal:

1. Erroneous conclusions of fact and law upon which the District Judge, Honorable Albert C. Wol-

lenberg, based his ruling that the portion of an income tax refund, attributable to the earnings of bankrupt's wife, is not subject to the debts of the husband, and is not an asset of the bankrupt's estate to be administered therein, and upon which an order was made revising the order of the Referee whereby it was directed that the sum of \$613.92 be turned over to the trustee by Norma Schoening.

Dated: April 25, 1961.

/s/ LLOYD W. CARTER,

Attorney for Kal W. Lines,
Appellant.

[Endorsed]: Filed April 26, 1961.

